No. 85-1798

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO MOTION TO AFFIRM

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

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16 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. TEXACO'S ATTEMPT TO NARROW THE SCOPE OF THE ISSUES BEFORE THIS COURT CANNOT SUCCEED.	3
II. AN AFFIRMANCE OF THE JUDGMENT BELOW WOULD NECESSARILY ERODE THE ANTI-INJUNCTION ACT.	5
III. AN AFFIRMANCE WOULD NECESSARILY UNDERMINE *YOUNGER*.	6
IV. AN AFFIRMANCE WOULD ENTAIL PREMATURELY SECOND-GUESSING A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS.	10
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Ammex Warehouse Co. v. Archer, 381 S.W.2d 478 (Tex. 1964)	8
Bender v. Williamsport School Dist., 106 S.Ct. 1326 (1986)	3
Bergman v. West, 262 S.W.2d 435 (Tex. Civ. App. 1953)	8
Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970)	10
Dandridge v. Williams, 397 U.S. 471 (1970)	10
Davis v. Scherer, 104 S.Ct. 3012 (1984)	3
Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985)	10
Glenn v. Hollums, 73 S.W.2d 1068 (Tex. Civ. App. 1934)	9
Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	2
Hernandez v. Finley, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)	7
Juidice v. Vail, 430 U.S. 327 (1977)	3, 9
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	5, 6
New Motor Vehicle Bd. v. Fox, 439 U.S. 96 (1978)	10
Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. 1980)	7, 8
Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)	9
Stefanelli v. Minard, 342 U.S. 117 (1951)	2
Svoboda v. Alexander, 3 S.W.2d 423 (Tex. Com. App. 1928)	9

PAGE

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) 10

Weinberger v. Salfi, 422 U.S. 749 (1975) 10

Younger v. Harris, 401 U.S. 37 (1971) 5

Statutes

28 U.S.C. § 1254(2) 2, 3

28 U.S.C. § 1257 5

42 U.S.C. § 1983 5

Texas Civ. Prac. & Rem. Code § 65.013 ..... 8, 9

Texas Prop. Code Ann. § 52.001 6

Rules

Texas R. Civ. P. 329b(e) 8

Texas R. Civ. P. 363 8

Texas R. Civ. P. 364(a) 4, 8

Texas R. Civ. P. 364(b) 8

Texas R. Civ. P. 364(c) 8

Other Authorities

C. Wright, *Federal Courts* (4th ed. 1983) 3

The Houston Chronicle (May 23, 1986) 9

INTRODUCTION

The basic refrain of Texaco's Motion to Affirm (MTA)[1] is: Don't worry, it'll never happen again. Appellee's vigor in pressing this point makes one wonder if perhaps Texaco doth protest too much: why argue that the federal intrusion upheld below could never happen again unless one senses that it *should* never happen again? In truth, it should never have been allowed to happen here.

For what Texaco says makes this case unique is in fact something that has yet to occur at all: a flat insistence by Texas on rigidly enforcing the state's lien and bond rules in the face of an objection *in its courts* as to the dire and unconstitutional results of doing so on these facts. But Texaco cannot be permitted to obscure the fact that it has *never* given the courts of Texas a chance even to *consider* its objections to such rigid enforcement. With or without Pennzoil's express waiver of its rights under the regime Texaco contests (*see* A129; JS 17 & n.10), there is simply no reason to assume that the Texas courts would have been any less sensitive than the federal judiciary to Texaco's legitimate concerns or that travelling to a federal court half a continent away represents a more rapid or certain path to a just outcome than would have been available in the Texas judicial system. Indeed, the *more* its situation can be fairly characterized as unique, the *less* justified is Texaco's unsubstantiated assumption—an assumption central to Texaco's case—that the Texas courts would blindly apply the standard, non-constitutional bond precedents cited by Texaco and by the court below, and would simply *ignore* Texaco's federal constitutional objections.[2] This Court's decisions per-

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1. References to the Motion to Affirm will be styled "MTA____"; to the Jurisdictional Statement, "JS____"; to the Appendices to the JS, "A____."

2. Texaco's forecast of futility for the state court challenge that it has yet to make is based on its extrapolation from cases that raised no claim under the federal Due Process Clause or under the Texas "open courts" guarantee—and cases that presented nothing akin to Texaco's supposedly "unique and extraordinary circumstances" (MTA9). Texaco's entire claim thus rests solely on pessimistic forecasts about how Texas courts would resolve questions that have never been put to them.

mit no such distrust and disdain for state courts as forums fully willing and able to vindicate federal rights.

What cannot be deemed unique to this case is the practice of endorsing federal "flanking movement[s] against the system of State courts," *Stefanelli v. Minard*, 342 U.S. 117, 123 (1951)—a practice that, if warranted on these facts, must be deemed warranted in a wide range of situations. It would be unprincipled and lawless to permit the court below to excuse its departure from precedent by saying, in effect, "only for Texaco." And it would be imprudent to suppose that other "exceptions" will not be made for other litigants. It is instructive to note in this regard how casually both Texaco (MTA7 & n.14, 13 & n.23) and the courts below (A14, 51, 76) extended, to a situation much less compelling (*see* JS 12 n.6), the Fifth Circuit's supposedly "unique" action in the civil rights context of *Henry v. First Nat'l Bank*, 595 F.2d 292 (5th Cir. 1979), where this Court merely denied certiorari. 444 U.S. 1074 (1980).[3] Even if a single point on a legal plane may be safely ignored, *two* points would surely make a line, especially if one of them were highlighted by an affirmance by this Court, in a case that Texaco concedes falls within the obligatory jurisdiction conferred by 28 U.S.C. § 1254(2). The importance and the complexity of the federal questions presented by this appeal are evident even from the Motion to Affirm; summary affirmance is therefore unthinkable.[4]

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3. Indeed, the district court, relying on *Henry*, treated the issuance of an injunction against Texas proceedings in this case as almost routine: "[T]he imposition of this sort of injunction is hardly unique." (A76).

4. Nor is it too late for this Court, in its 1986-87 Term, to remit to the Texas courts the matter of arranging security pending the appeal of Pennzoil's trial court judgment—an appeal unlikely to be concluded even in the Texas courts alone prior to mid-1987 at the earliest. But should this Court be concerned lest developments in Texas overtake its docket and moot the matter before principles of federalism may be vindicated here, the suitable form of prompt disposition would be summary reversal on the ground that the federal courts were wrong to intrude at all.

I. TEXACO'S ATTEMPT TO NARROW THE SCOPE OF THE ISSUES BEFORE THIS COURT CANNOT SUCCEED.

It is understandable that Texaco should be apprehensive about this Court reviewing the Second Circuit's jurisdictional holdings, but Texaco's suggestion that the Court might properly confine its obligatory review under § 1254(2) to the merits of the Second Circuit's "due process ruling" (MTA14 n.26) is altogether frivolous. For a federal appellate court cannot pass on the merits of a lower court's decision without first finding that that court properly asserted jurisdiction to *reach* the merits. *See, e.g.*, C. Wright, *Federal Courts* 22-23 (4th ed. 1983).[5]

Texaco's attempt substantively to narrow the due process issue presented by this appeal is no more convincing than its procedural gambit. *First*, the holding below cannot be limited to situations where supposedly "inflexible" security requirements would "destroy" the debtor's right to appeal. (MTA10). Even if the inflexibility of Texas' requirements were conceded—which it is not—only the *size* of the bond that it fears would be required of it allegedly renders its appeal futile. It would not matter to *this* claim whether that bond were imposed by an iron legislative rule or by a flexible, *ad hoc* judicial determination. The Second Circuit's holding thus authorizes federal judicial intervention whenever a state's supersedeas procedure might require a bond large enough to threaten a particular judgment debtor with irreversible enforcement.

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5. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' " *Bender v. Williamsport School Dist.*, 106 S.Ct. 1326, 1331 (1986). *See also Juidice v. Vail*, 430 U.S. 327, 331 (1977) (on direct appeal from three-judge court, this Court should not reach "merits of the constitutional dispute" where *Younger* should have led lower court to abstain). Texaco's only contrary authority is a curious citation to *Davis v. Scherer*, 104 S.Ct. 3012 (1984), in which this Court reviewed an immunity issue "not related" to the validity of the state law in question after declaring that it has power to decide all the federal questions presented in "cases where the Court of Appeals has declared a state statute unconstitutional," *id.* at 3017 n.7.

Second, the holding below cannot be confined to situations where the required bond or alternate security "deposit", Tex.R.Civ.P. 364(a), is "impossible" for *any* judgment debtor to obtain. (MTA10). For a smaller security requirement imposed on a less wealthy judgment debtor could just as clearly exceed that party's financial capacity—a common occurrence, despite Texaco's rhetorical question (*see* MTA10-11 n.19), since many businesses might be unable to post security because of a limited cash flow and the nature of their assets, whether or not they have net illiquid assets in excess of the judgments against them. Any such debtor's appeal would be "destroyed" no less surely than Texaco claims its own to be.

Third, the holding below cannot be confined to situations where requiring a full bond is supposedly unnecessary to protect the judgment creditor's interests. (MTA10). Despite Texaco's repeated assertions, Pennzoil has never "conceded" that Texaco's size makes further security superfluous.[6] Texaco's assets, after all, represent oil and gas that is readily depletable and of declining value in the midst of the current global oil glut.[7] And even the district court, concerned that "other creditors of Texaco will . . . seek[ ] to perfect security interests higher than that . . . available to Pennzoil" (A77), held that, whatever the size of the appropriate judgment, it "must be secured by assets or obligations at least equal in value . . . ." (A77).[8]

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6. *See, e.g.*, Pennzoil's Reply Brief in the Second Circuit at 5. The references by both Texaco and the court below to such statements are uniformly citations to hearsay newspaper reports of statements attributed to Pennzoil officials or attorneys. *Compare, e.g.*, MTA5 n.11 and A46 with A116-17.

7. *See* A101 (District Court Findings 80-81); Kerr Affidavit at 3-5, attached to Pennzoil's Second Circuit Motion to Modify or Stay the Judgment.

8. Pennzoil has devoted little effort to refuting Texaco's assertions in federal court about what precise on-going arrangements are needed adequately to secure the state court judgment for the simple reason that this complex matter should be resolved in the tribunals of Texas. That is why this appeal has been brought. That the concrete risk to Pennzoil's security interests grew as oil prices fell and as Texaco's approaches to possible new creditors multiplied, *see* Pennzoil's Second Circuit Motion to Modify or Stay

II. AN AFFIRMANCE OF THE JUDGMENT BELOW WOULD NECESSARILY ERODE THE ANTI-INJUNCTION ACT.

Texaco's astounding suggestion that this case is "narrower than *Lugar* [*v. Edmondson Oil Co.*, 457 U.S. 922 (1982)]," because "this is solely an injunction action, not a suit for damages" (MTA20), completely misconceives the federalism concerns embodied in the Anti-Injunction Act for nearly two centuries: it is axiomatic that *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion. And it is hard to take seriously the idea that, because Texaco could have chosen to seek a § 1983 "injunction . . . against the state officials involved in the proceeding" (MTA19), the Second Circuit's state action holding "has *no* impact on the breadth of the § 1983 exception to the Anti-Injunction Act" *id.* (original emphasis). Obviously, Texaco sued Pennzoil instead of state officials in an attempt to avoid *Younger v. Harris*, 401 U.S. 37 (1971), which would have blocked Texaco's federal foray had it sued "any arm of the state." (A34). *Only* the Second Circuit's expansion of the state action concept enabled it to drive a wedge between the Anti-Injunction Act and *Younger*, creating the opening through which Texaco obtained federal relief *pendente lite*.

Texaco's Motion to Affirm distorts *Lugar* by undermining the only principled limitations that can prevent *Lugar* from becoming an all-purpose doctrine transforming *every* state-court judgment winner who seeks enforcement into "the

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the Judgment at 4, while accounting for a delayed decision to press this appeal, *cf.* MTA6 n.12, is, of course, legally immaterial.

Pennzoil declines to speculate on Texaco's motives for seeking federal intervention in Texas judicial proceedings. *Compare* MTA6 & n.12. But it must be noted that, contrary to Texaco's misrepresentation to this Court that Texaco "did not seek" to have the Texas judgment "review[ed] or modifi[ed]" by a federal court (MTA7), Texaco has in fact used the federal judiciary in just such an effort to undo its Texas trial loss: its federal complaint sought "appellate review on the merits of the Texas judgment in violation of 28 U.S.C. § 1257 as interpreted by [this] Court" (A5), and the district court granted injunctive relief to that end before being rebuked and reversed by the Second Circuit. (A19). Indeed, Texaco persists in arguing to *this* Court that the Texas trial court's judgment was "*erroneous*." (MTA12) (original emphasis).

state." *Lugar* held a state-court plaintiff to be a state actor only because state law abdicated to him the unilateral and unsupervised power to determine, simply by filing a complaint and an *ex parte* attachment petition, *see* 457 U.S. at 924, both that a debt was owed and that security therefor was required pending trial. Pennzoil wields no such power. The determination that Texaco owes Pennzoil damages was made by a judge and jury after a 4½ month trial; the decision presumptively to require security for all such judgments was made by the Texas Legislature when it enacted § 52.001 and by the Texas Supreme Court when it promulgated Rule 364; and the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request. *See* III *infra*. A winning plaintiff like Pennzoil, which the Second Circuit credits with "unilateral" power to make "state officials do [its] bidding" (A28), is in truth relegated to the role of delivery boy:[9] all the *power* at issue is wielded by organs and agents of the State of Texas. The suggestion that Pennzoil is here exercising unsupervised and unilateral official state power can be advanced, therefore, only by completely and artificially severing the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed.

III. AN AFFIRMANCE WOULD NECESSARILY UNDERMINE *YOUNGER*.

Most alarming is the Second Circuit's holding that *Younger* can be evaded by a federal plaintiff's unilateral, self-serving prediction that resort to state judicial procedures would be futile. The gravamen of Texaco's argument is not that it could not have *raised* its constitutional challenge in the Texas courts, but that such a challenge would probably have been denied, since none had ever succeeded in the past. (MTA27 n.53). Even

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9. Pennzoil's role in enforcing its judgment against Texaco would be limited to asking the Texas court for a writ of execution and delivering it to a sheriff. (A25; MTA1 n.2). And its role in perfecting judgment liens against Texaco would likewise be limited to obtaining an abstract of the trial court's judgment from one court clerk and handing it to another for recording and filing. (A25-26; MTA2 n.3).

if that were the *Younger* standard—which it is not[10]—Texaco persists in ignoring the fact that the Texas courts have *never been given the opportunity* to address a challenge like Texaco's to the lien and bond provisions.[11]

More fundamentally, Texaco's claim that Texas remedies are inadequate—a claim without which Texaco's entire case crumbles—is built upon three gross misrepresentations of Texas law. If Texaco and the Second Circuit had taken Texas law seriously, they would have found several rapid ways for Texaco to stay the judgment *while* challenging the lien and bond provisions.[12]

First, like the judgment debtor in *Pace v. McEwen*, 604 S.W.2d 231, 233 (Tex.Civ.App. 1980), Texaco could have

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10. Texaco errs in relying on *Hernandez v. Finley*, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979), for the proposition that something less than a "procedural bar" to raising one's federal claims will suffice to suspend the abstention requirement. (MTA26 n.51). The court in *Hernandez* in fact found just such an absolute procedural bar when it accepted the argument that the pre-judgment attachment statute at issue "restrict[ed] challenges to the attachment exclusively to the issues of whether prescribed procedures have been followed and whether the allegations of the affidavit are true." 471 F.Supp. at 519.

11. Texaco fails to mention that the Texas "conference" it requested on December 13, 1986 (MTA4)—three days *after* it sought injunctive relief and appellate review of the Texas judgment in the federal district court in White Plains—would have concerned only alleged "uncertainties" in the Paragraph 7 "stand-still" arrangement, and not the state *or* federal constitutionality of applying the lien and bond provisions. (A10). Texaco also elides the fact that it submitted its "request" *in forma pauperis* by *letter*, not by motion or petition, and the fact that Texaco failed to respond to requests by both Pennzoil and the Texas trial court that Texaco comply with the Texas Rules of Civil Procedure if it wished a hearing. (*See* District Court Findings Nos. 82, 85-87, A101-02).

12. Texaco nowhere denies that, even without posting a supersedeas bond, it still had *3½ months* in which to ask the Texas courts for relief. Texaco filed its federal injunction action on December 10, 1985—before the Texas judgment had even been *entered*—even though the stand-still agreement to which Texaco had that very day consented ensured that Texaco need fear no enforcement of the judgment or attachment of liens until late March of 1986. (A7 & n.3; A127-28).

sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond.*[13]

Second, the Texas trial court itself is "vested" with the power "to grant a temporary injunction to prevent damage to an appellant," when enforcement of a civil judgment would render the right to appeal "meaningless." *Pace, supra*, 604 S.W.2d at 233, 232. (*See* JS 18 n.11).[14]

Third, as Pennzoil previously explained (JS 18 n.11), a Texas trial court has *explicit statutory power* to "stay a judgment" (not merely to stay its execution) if the complainant can show himself "equitably entitled to be relieved against" part or all of that judgment. Tex.Civ.Prac. & Rem.Code § 65.013. Contrary to Texaco's contention that such relief will not lie if the judgment debtor has not filed a supersedeas bond in compliance with Rule 364 (MTA27 n.53), that rule, *as amended in 1984*, explicitly recognizes that in appropriate circumstances other statutes may govern the suspension of a judgment.[15] Texaco's authorities for the proposition that § 65.013 cannot be applied to mitigate the full bond requirement of Rule 364 pre-date the 1984 amendment by half a century and are in any event utterly irrelevant: neither case involved a constitutional challenge such as Texaco's; in neither

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13. Texaco is simply wrong in stating that it would have had to waive its new trial motion in order to perfect an appeal and petition the appellate court for such relief in mid-December of 1985. (MTA27 n.53). It is black letter law in Texas that Texaco could have perfected its appeal by filing a very small cost bond (*not* a supersedeas bond) on the very day the trial court entered judgment, *see* Tex.R.Civ.P. 363; and "if a motion for new trial is timely filed by any party, the trial court, *regardless of whether an appeal has been perfected*, has plenary power to grant a new trial . . . ." Tex.R.Civ.P. 329b(e) (emphasis added). *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex.Civ.App. 1953).

14. Contrary to Texaco's inexcusable misrepresentation, the *Pace* court enjoined a "forced sale" of real property that had been ordered to satisfy "a money judgment," 604 S.W.2d at 232—*not* a "judgment . . . for recovery of specific real property." (MTA27 n.53). The case thus sounded in Rule 364(b), not (c), and is directly on point.

15. The 1984 amendment to paragraph (a) of Rule 364 added the prefatory phrase "Unless otherwise provided by law . . . ." to the language requiring a full supersedeas bond for the suspension of a judgment. (*See* JS 19 n.11).

case did the judgment debtor attack the required bond as unaffordable or unnecessary; and neither case was in fact governed by the "statutory predecessor to § 65.013" (MTA27 n.53).[16]

Thus timely relief in the Texas courts was fully available. And Texas' interest in being afforded an opportunity (subject to Supreme Court review) to grant such relief in the course of administering its appellate system is no less basic than its interest in assuring that its judicial "orders and judgments are not rendered nugatory." *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). These systemic state interests in overseeing and fine-tuning the appellate process in light of applicable federal constitutional norms remain the same whomever the state court judgment loser sues in federal court.[17] Only the Second Circuit's disregard of these interests permitted it to address the merits of Texaco's constitutional arguments.[18]

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16. The judgment debtors in *Glenn v. Hollums*, 73 S.W.2d 1068 (Tex.Civ.App. 1934), sought to enjoin a judgment on the basis of an entirely distinct Depression-era foreclosure moratorium statute, *id.* at 1069-70, and in *Svoboda v. Alexander*, 3 S.W.2d 423 (Tex.Com.App. 1928), which did not even involve a supersedeas bond, a temporary injunction against enforcement of a judgment was in fact *granted* by the trial court. *Id.* at 424. Even if Texaco's authorities were arguably relevant, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941), would preclude a federal resolution of the resulting state-law issue. But in fact Texaco has yet to produce even *arguable* support for its mechanical reading of Texas law.

17. Having deliberately declined to sue any Texas officials in an attempt to avoid *Younger*, Texaco cannot now attribute significance to the fact that no Texas officer is a party. (MTA8 n.16). But if Texaco's profligate use of newspaper "authorities" is acceptable, it seems that the Texas Attorney General declined to press a separate appeal because of his confidence that the State's interests would be well represented by Pennzoil and because of his conclusion that "there [was] no need to file duplicate documents." *The Houston Chronicle*, § 1, p.22 (May 23, 1986).

18. While Texaco persists in arguing that the federal interference wrought by its foray to White Plains somehow made the appellate process in Texas more meaningful (MTA24), it has not denied—nor could it—that Congress has never conferred upon lower federal courts the power to displace state tribunals or this Court in protecting the state appellate process and this Court's jurisdiction.

Texaco (MTA28) and the court below (A22-23) err in treating the *Rooker/Feldman* doctrine as applicable only where a litigant seeks to reverse a prior state court decision—treatment that would reduce the doctrine to one of

IV. AN AFFIRMANCE WOULD ENTAIL PREMATURELY SECOND-GUESSING A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS.

Reaching a due process claim it should have left to the state courts, the Second Circuit held it irrational (A44) for Texas to require full security without determining whether doing so is justified on these facts. Even assuming the Texas courts *would* decline to make that determination, it is hardly irrational for a state to deem a trial's completion a watershed, and to use that event as the basis for shifting to the loser any risk of economic loss if the trial result is later overturned.[19] "Once having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions" of the scheme adversely affect a given party. *New Motor Vehicle Bd. v. Fox*, 439 U.S. 96, 108 (1978).[20] Yet Texas might well have done just that—if Texaco had only asked.

CONCLUSION

Far from posing a "narrow and unusual case [that] does not merit plenary review" (MTA30), the decision below constitutes a frontal and wide-ranging assault on judicial federalism and principled adjudication—one that could not be upheld by this Court without serious systemic consequences. Probable jurisdiction should therefore be noted.

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mere issue preclusion. At least two other circuits have clearly rejected this treatment. *See, e.g., Brown v. Chastain*, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Ganey v. Barefoot*, 749 F.2d 1124, 1127-28 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985). Texaco's contrary assertion (MTA29 n.56) reveals a plain misreading of *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985).

19. Applying such a flat rule would not remotely resemble a decision to render an appeal ineffectual by denying counsel or a trial transcript to indigent criminal defendants; or to allow ineffective assistance of counsel to squander a criminal defendant's appeal; or to allow a clerical snafu to obliterate forever a civil plaintiff's administrative cause of action. (*See* MTA 10 & n.18).

20. *See also Weinberger v. Salfi*, 422 U.S. 749, 772-74, 776-77, 782-83 (1975); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970).

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

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